83-88

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MCDONNELL DOUGLAS CORPORATION,
Petitioner,

vs.

NORTHROP CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

DON T. HIBNER, JR.
333 South Hope Street, 48th Floor
Los Angeles, California 90071

JOHN W. CHIERICHELLA
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036

Counsel for Respondent
Northrop Corporation

Of Counsel:

SHEPPARD, MULLIN, RICHTER & HAMPTON
333 South Hope Street, Suite 4800
Los Angeles, California 90071
(213) 620-1780

CROWELL & MORING
1100 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 452-5800

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PANDICK PRESS LOS ANGELES, 1945 S. FIGUEROA, LOS ANGELES, CALIFORNIA (213) 747-4321

STATEMENT REQUIRED BY RULE 28.1

This Brief is filed on behalf of Northrop Corporation, which has no parent companies. It has direct or indirect equity interests in the following companies (in addition to its wholly owned subsidiaries):

Construcciones Aeronautics, S.A. (CASA)
Electronica Basica, S.A. (ELBASA)
Fuller-Shuwayer Co., Ltd.
N.V. Koninklijke Nederlandse Vliegtuigenfabriek Fokker

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NORTHROP CORPORATION'S BRIEF IN OPPOSITION TO McDONNELL DOUGLAS CORPORATION'S PETITION FOR A WRIT OF CERTIORARI

Northrop Corporation respectfully prays that this Court refuse to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit entered in the above action on February 28, 1983, as modified on May 9, 1983.

I

INTRODUCTION

This is an action in which Northrop Corporation ("Northrop") seeks relief for McDonnell Douglas Corporation's ("MDC") systematic breaches of contract, fraud and other predatory conduct in violation of Section 2 of the Sherman Act.[1] The Court of Appeals for the Ninth Circuit ("Ninth Circuit") has reversed an order granting summary judgment and dismissal on the principal ground that genuine issues of material fact render summary disposition inappropriate. There

[1] Sherman Antitrust Act, 15 U.S.C. § 2 (1976).

has been no trial on the merits and discovery is incomplete. MDC's arguments supporting its Petition for Writ of Certiorari are either erroneous legal contentions or are based on hotly contested factual issues.

MDC argues an astounding and dangerous proposition. It claims that because of the structure and operation of the weapons procurement industry, it is totally unaccountable for predatory conduct that the Ninth Circuit found to be "without legitimate business purpose." *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1058 (9th Cir. 1983). Using the doctrines of indispensability under Federal Rule of Civil Procedure ("Fed.R.Civ.P.") 19, Political Question and Act of State, MDC has attempted to fashion new doctrines of antitrust and common law immunity.

The Ninth Circuit reversed the District Court's decision, *in toto*, citing numerous instances where the District Court, contrary to this Court's admonition in *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962), made findings and conclusions based solely on disputed facts. MDC would have this Court believe that the Ninth Circuit erred by requiring disputed facts to be tried, and that this case presents "questions of exceptional importance." Brief for Petitioner at 2. MDC points to no conflict among the circuits. Its attempt to create an impression that the Ninth Circuit has disregarded Supreme Court antitrust precedent is disingenuous and founded on factual mischaracterizations.

MDC should be held accountable for its breaches of contract, torts, frauds, statutory violations and unconscionable predatory business conduct. The Ninth Circuit correctly remanded this matter to the District Court for completion of discovery and trial on the merits.

II

COUNTERSTATEMENT OF THE CASE

A. FACTUAL BACKGROUND.

During the early and mid-1960's, Northrop foresaw the need for an inexpensive, lightweight, multi-mission fighter/attack aircraft. Northrop committed its best designers and engineers, at a cost of millions of dollars of its own funds, to design an aircraft to meet that need. The design became known as the P-530. Northrop also designed a carrier-suitable derivative of the P-530 called the P-630. The P-530 and P-630 designs incorporated revolutionary aerodynamic configurations and a new concept of engine and airframe integration.

In 1972, the U.S. Air Force ("USAF") solicited proposals from the major American military aerospace contractors for an aircraft design utilizing lightweight fighter ("LWF") technology. MDC elected not to respond, choosing instead to concentrate on its expensive and sophisticated F-15. Northrop's LWF proposal was based on the aerodynamic advancements achieved in its P-530 design program.

On April 14, 1972, the USAF selected Northrop and General Dynamics Corporation ("GD") as the winners of the LWF competition. Each was awarded a contract to produce two flying prototypes to demonstrate LWF technology. Northrop's prototypes were designated YF-17's, and GD's were designated YF-16's.

After testing began on the YF-16 and YF-17 prototypes, the USAF in 1974 decided to conduct the Air Combat Fighter ("ACF") competition to select one of the LWF prototypes for a new lightweight fighter aircraft. As Northrop and GD had built the LWF prototypes, other aircraft manufactures were effectively excluded from the ACF competition.

In mid-1974, the U.S. Navy ("Navy") announced that it would concurrently conduct what became known as the Naval Air Combat Fighter ("NACF") competition to develop a multi-mission aircraft for use aboard aircraft carriers. To take advantage of its prior funding of LWF technology, Congress directed the Navy to limit the NACF competition to proposals based on Northrop's YF-17 and GD's YF-16 technology. Thus, MDC's failure to enter the LWF competition resulted in it being excluded from both the USAF and Navy competitions.

Because GD and Northrop had not been traditional suppliers of carrier-suitable aircraft to the Navy, the Navy asked each company to "team"[2] for the NACF competition with a company having experience in producing carrier-suitable aircraft for the Navy.[3]

After determining that Northrop's YF-17 design had technological advantages over GD's YF-16, MDC contacted Northrop in September, 1974 and proposed forming a teaming relationship. To avoid a repetition of what had become known in the military aircraft industry as the "TFX fiasco,"[4] Northrop suggested that the teaming agreement, within the structure of the team, assign prime contractor responsibilities for YF-17 derivatives along military service lines. MDC concurred, and a preliminary Teaming Agreement was signed by the parties on October 2, 1974.

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[2] Teaming relationships are authorized by Defense Acquisition Regulation 4-117, 32 C.F.R. § 4-117 (1982).

[3] The Navy's traditional suppliers were Grumman, LTV, and MDC. Although Northrop possessed the technical proficiency to produce superior carrier-suitable aircraft, Northrop believed that unless it was *perceived* as a contractor with carrier-suitable experience, its NACF proposal was not likely to be considered seriously by the Navy. *See, e.g.*, Grumman Corp. v. LTV Corp., 665 F.2d 10 (2nd Cir. 1981).

[4] The TFX aircraft was developed by a single prime contractor to serve both the USAF and the Navy. Because the single prime contractor was never able to resolve conflicting design demands of the two services, the program proved a technical and financial disaster.

In the Teaming Agreement, the parties agreed that Northrop would concentrate on the team's efforts to win the ACF competition while MDC concurrently concentrated on winning the NACF competition.[5] Pursuant to the agreement, Northrop provided MDC with P-530, P-630 and YF-17 design analysis, test data, design review participation and on-site technical liaison to interpret and apply the data. Contrary to MDC's assertion that Northrop technology was transferred "without restriction," the sole purpose for the technology transfer to MDC was to enable MDC, as a team member with Northrop, to develop, propose and produce "a carrier suitable version of the YF-17 (USN ACF) to satisfy the Navy's ... requirements."[6] Brief for Petitioner at 5.

On January 14, 1975, Northrop's proposal lost the ACF competition to GD's F-16. On May 2, 1975, the Navy announced that the Northrop/MDC team's proposal, based on Northrop's technology, had won the NACF competition and would be designated the F-18.

On June 27, 1975, MDC and Northrop entered into a second agreement ("Basic Agreement," amended in 1976) which definitized the relationship of the parties as contemplated by the Teaming Agreement. Like the Teaming Agreement, the Basic Agreement is exclusively a private undertaking to which the Government is not a party. The Basic Agreement provides that the Northrop/MDC team "work together" to develop and produce aircraft derived from Northrop's YF-17 design. As contemplated in the Teaming Agreement, MDC is the prime contractor *for the team* on sales of the carrier-suitable F-18A

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[5] After Northrop and MDC entered into their teaming relationship, GD teamed with LTV for the NACF competition. The United States Government ("Government") was not a party to either teaming agreement.

[6] Although the Government possessed unlimited rights in YF-17 data and was free to transfer that data to MDC, the fact is that MDC received YF-17 data under license from Northrop, together with substantial Northrop know-how and P-530 and P-630 data in which the Government had no rights. Contrary to MDC's assertions, the Government neither authorized MDC's use of YF-17 data nor disclosed such data to MDC.

weapons system to the Navy and foreign customers, and Northrop is prime contractor *for the team* on sales of F-18's to the USAF and land-based variants of the F-18 to foreign customers, with the other party in each case being a principal subcontractor in the production of the aircraft.[7]

As a result of the Basic Agreement, for the first time in history foreign customers have a choice of different prime contractors for aircraft of the same family. Prior to the Basic Agreement, all modern military aircraft had been made available to customers only on a sole source basis. The Northrop/MDC team was assembled to meet the defense needs of this nation's military services at the Government's suggestion, and introduced heretofore nonexistent competition into the marketplace.

Although Northrop created the business opportunity for the team, MDC thereafter used the data acquired from Northrop and its position as prime contractor on the F-18A to suppress the competition which resulted from the parties' agreements. The Ninth Circuit was understandably impressed with the strength of Northrop's evidence and stated that "the memoranda prepared by top McDonnell executives offer *strong direct evidence* of McDonnell's alleged intent to monopolize" and that the alleged predatory conduct "is clearly conduct 'without legitimate business purpose.'" 705 F.2d at 1058 (emphasis added). MDC's conduct consists of an unlawful campaign to protect sales of its F-15 and to monopolize the market for F-18 aircraft. MDC has engaged in a carefully planned and executed strategy to destroy Northrop as a competitor by employing the following tactics (among others): (1) concerted refusals to deal, (2) commercial disparagement and misrepresentation, (3) interference with Northrop's international F-18 marketing, (4) wrongful economic coercion, (5) systematic breaches of the parties' agreements, and (6) industrial espionage.

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[7] Northrop's land-based version later became widely known as the "F-18L" or "Cobra." MDC's version is known as the "F-18A" or "Hornet."

This Court should therefore deny petitioner's Petition for a Writ of Certiorari.

B. THE DISTRICT COURT'S DECISION.

Northrop filed this action in late 1979 seeking damages and injunctive relief for MDC's alleged (1) breaches of the Basic Agreement, (2) fraud in the inducement of the Teaming Agreement and Basic Agreement, (3) attempt to monopolize the F-18 market, (4) unfair competition, and (5) misappropriation of Northrop's property. In addition, Northrop sought a declaration of the parties' rights and obligations under the Basic Agreement, an accounting of profits earned by MDC and recovery in *quantum meruit* for materials and services provided by Northrop to MDC without compensation. After limited discovery, the District Court dismissed Northrop's First Amended Complaint in its entirety and alternatively granted MDC summary judgment on five of Northrop's eight claims.[8]

The reasoning behind the District Court's entry of summary judgment on the parties' antitrust claims is a model of inconsistency, premised on hotly disputed material facts as to the competitive characteristics of the military aircraft industry, the relationship between Northrop and MDC, the economic effect of the prime contractor role in the military sales context, and on a misapplication of the *per se* rule. On the one hand, the District Court held there was insufficient trade or commerce to support a Section 2 claim. On the other hand, the court held that the assignment of prime contractor responsibilities in the Basic Agreement is a *per se* violation of Section 1 of the Sherman Act.[9] *Northrop Corp.* v. *McDonnell Douglas Corp.*, 498 F.Supp. 1112, 1123 (C.D.Cal. 1980), *rev'd*, 705 F.2d 1030 (1983). The District Court did not explain how trade could be restrained if there was no trade or commerce among the states or with foreign nations.

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[8] At the time of the District Court's ruling, discovery was being conducted but remained incomplete. For example, Northrop has not had an opportunity to obtain or review internal MDC documents relating to the marketing of MDC's F-15 aircraft, which it was attempting to protect from competition with the F-18L.

[9] Sherman Antitrust Act, 15 U.S.C. §1 (1976).

In addition to its antitrust rulings, the District Court decided that all of Northrop's claims were barred by the Political Question Doctrine because they raised non-justiciable "political issues," that would force the court to become the "super-procurer and sales licensor" of the F-18 weapons system. *Id.* at 1120. The District Court also held that Northrop's claims were barred by the Act of State Doctrine by accepting as true MDC's unsubstantiated assertion that the court would have to inquire into the minds of foreign governments to establish that Northrop suffered injury as a result of MDC's conduct. *Id.* at 1121.

Lastly, the District Court dismissed Northrop's claims because it found that the Government was an indispensable party under Fed.R.Civ.P. 19. This determination was based on the court's erroneous belief that Northrop's claims "called into question" the Government's "unlimited rights" [10] in F-18 technical data and would prohibit the Government from procuring non-carrier-suitable F-18 aircraft from MDC. *Id.* at 1117.

C. THE COURT OF APPEALS' DECISION.

The Ninth Circuit's reversal of the District Court on the Political Question, Act of State and Rule 19 issues was based on a better understanding of the relief requested by Northrop. The Ninth Circuit recognized that the relief requested by Northrop (1) does not require that a court "challenge the wisdom or legality of any governmental act or decision" or result in the "direct interjection of the judiciary into the Government's procurement activity," 705 F.2d at 1047, (2) would not "necessitate direct judicial inquiry into [the procurement] decisions" of foreign governments, *Id.* at 1048, (3) would not affect the Government's unlimited rights in F-18

[10] "Unlimited Rights" are defined in Defense Acquisition Regulation 9-201(d), 32 C.F.R. § 9-201(d) (1982), as the "rights to use, duplicate, or disclose technical data or computer software in whole or in part, in any manner and for any purpose whatsoever, and to have or permit others to do so." *See also* Defense Acquisition Regulation 7-104.9(a), 32 C.F.R. § 7-104.9(a).

technical data, *Id.* at 1044, and (4) would not bar the Government from offering F-18 work to any contractor, or preclude any contractor, including MDC, from accepting such work. *Id.* at 1045.

The Ninth Circuit found that this case presents "novel antitrust considerations" warranting rule of reason analysis. *Id.* at 1051. The court's decision was based on two principal grounds. First, the court recognized that the military aircraft industry, and more particularly military teaming agreements, have never received judicial scrutiny. The Ninth Circuit followed this Court's admonitions in *Broadcast Music, Inc., v. Columbia Broadcasting System,* 441 U.S. 1 (1979), and *Arizona v. Maricopa County Medical Society,* 457 U.S. 332 (1982), against the overly simplistic characterization of a questioned restraint. Second, the court was impressed with the fact that the parties' agreements "foster competition by allowing both parties to compete in a market from which they were otherwise foreclosed." 705 F.2d at 1052-53. The court recognized that competition between the F-18A and F-18L is a "surprisingly pro-competitive occurrence in an industry typified by single source products." *Id.* at 1052.

III

REASONS FOR DENYING THE REQUESTED WRIT

A. TEAMING AGREEMENTS AND RECIPROCAL ASSIGNMENT OF PRIME CONTRACTOR ROLES IN THE MILITARY AIRCRAFT INDUSTRY HAVE NEVER BEEN SUBJECTED TO ANTITRUST SCRUTINY AND MERIT RULE OF REASON ANALYSIS.

1. *The Assignment Of Reciprocal Prime Contractor Responsibilities Is Pro-Competitive And Is Not A Market Division.*

MDC contends that the declaratory and injunctive relief sought by Northrop would transform the Basic Agreement into a contract by horizontal competitors to divide the world market

for F-18 aircraft between them, the USAF and non-carrier-suitable F-18 aircraft market to Northrop and the Navy and carrier-suitable F-18 aircraft market to MDC.[11] It then asserts that the simple question before this Court is whether such a "horizontal market" division between military contractors is illegal *per se* under Section 1 of the Sherman Act.

Seemingly attractive in their simplicity, MDC's assertions completely mischaracterize the nature of the relationship established by the parties' agreements. Under the Basic Agreement, the parties agreed to work together *as a team* to design, develop, produce and market military aircraft derived from Northrop's technology and YF-17 design. The party that is prime contractor on a particular configuration performs 60% of the work on the aircraft. The other party as principal subcontractor performs 40% of the work involved in production of the aircraft. Only the respective roles of prime contractor and subcontractor were expected to vary depending upon whether the customer, foreign or domestic, desired a carrier-suitable or land-based aircraft.[12] As discussed earlier, the shifting of prime contractor responsibilities within the team was intended to assist the team in meeting conflicting customer requirements for the team's one product—the F-18 weapons system.

In the past, teaming relationships between military contractors have traditionally designated one party, the party developing the original technology, as the prime contractor on

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[11] MDC alternatively characterizes the Basic Agreement as an allocation of customers rather than a division of markets. MDC contends that the Basic Agreement as construed by Northrop divides customers on "product specific bases" with MDC being allowed to market its product to customers having a need for carrier-suitable aircraft. Brief for Petitioner at 7. MDC at least implies that such customers are limited to countries possessing aircraft carriers. MDC's own Petition, however, identifies three countries, Canada, Spain and Australia, that do not possess aircraft carriers but have nonetheless purchased the carrier-suitable F-18A with MDC serving as prime contractor on behalf of the team. *Id.* at 1-2.

[12] The prime contractor, in addition to producing those segments of the aircraft for which it has design responsibility, also stands in privity of contract with the customer, markets the aircraft, designates subcontractors on its portion of the work and performs final assembly of the aircraft.

all sales of the team's product. The Northrop/MDC teaming relationship is the first teaming relationship in U.S. military history that allows both parties to compete for sales of the team's product. The Northrop/MDC teaming relationship is therefore uniquely pro-competitive because it allows MDC and Northrop to market F-18 aircraft of different configurations in head-to-head competition with each other.

MDC's mischaracterization of the Basic Agreement as a run-of-the-mill horizontal market division is based on the false premise that Northrop and MDC were at all times horizontal, active competitors, each capable of competing, one against the other, for the manufacture and sale of aircraft designed to satisfy the Navy's NACF requirements. Prior to the parties' teaming relationship, the USAF limited its ACF competition to Northrop and GD, and Congress limited participation in the NACF competition to proposals based on proprietary Northrop and GD LWF technology. MDC was, therefore, not an actual or potential competitor of Northrop's for the sale of YF-17 or F-18 aircraft, or their derivatives, at the time the teaming relationship was established.

If it had not teamed with Northrop, MDC would not be producing F-18 aircraft for use by the Navy or foreign customers. MDC, foreclosed from the market by Congressional directive and its own failure to enter the LWF competition, reluctantly concluded that a teaming relationship with Northrop or GD:

> "was the only crap game in town, so we had to play it . . . *The Navy wasn't going to let us prepare our own airplane* and win with it, so we had to go their way." (emphasis added). 705 F.2d at 1037 n.2.

Although MDC's only option was to team, Northrop had a number of alternatives. Northrop could have ignored the Navy's teaming suggestion and attempted to win the competition by itself.[13] It could have declined to participate in the

[13] In light of the Navy's predisposition to deal only with contractors possessing carrier-suitable experience, a serious question remains whether the Navy would have awarded a contract to Northrop alone. *See* Grumman Corp. v. LTV Corp., 665 F.2d 10 (2d Cir. 1981). *See supra* note 6.

NACF competion in favor of devoting all its efforts to the ACF competition. Alternatively, Northrop could have teamed with a traditional Navy contractor while limiting its teaming partner to being a principal subcontractor on the Navy aircraft with Northrop retaining all prime contractor responsibilities, including all foreign and domestic marketing.[14] Each of those alternatives would have been lawful. None, however, would have added a new competitor to the market.

The Northrop/MDC teaming relationship with its shifting assignment of prime contractor and subcontractor responsibilities created competition in an industry characterized by market concentration and significant barriers to entry. *See Grumman Corp.*, 665 F.2d at 12. As the Ninth Circuit noted:

> "[B]ut for the teaming effort General Dynamics and other manufacturers of aircraft fitting the same general buyer needs as the F-18 would have had neither F-18 variant to compete against. Thus, not only do the agreements not preclude all competition between the parties' respective variants of the F-18, they actually foster competition by allowing both parties to compete in a market from which they were otherwise foreclosed." 705 F.2d at 1052-53.

2. The Teaming Relationship And Assignment Of Prime Contractor Responsibilities Are Previously Unexamined Business Practices In A Unique Industry.

Per se treatment has been reserved for those business practices that are so "plainly anticompetitive", *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978), and so "lack . . . any redeeming virtue," *Northern*

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[14] Although the Navy suggested that Northrop and GD each team with a contractor having experience designing and producing carrier-suitable aircraft, the Navy did not require that the teaming partner be the prime contractor on sales to the Navy. The GD/LTV teaming agreement provided that if GD's YF-16 proposal in the ACF competition was not selected by the USAF and LTV's YF-16 proposal in the NACF was selected by the Navy, GD was to be the prime contractor on all sales of YF-16 derivatives to the Navy.

Pacific Railway v. United States, 356 U.S. 1, 5 (1958), that they are presumed to be unlawful without inquiry as to their competitive effects. It is not until the judiciary has "experience with a particular kind of restraint [that] enables the Court to predict with confidence that the rule of reason will condemn it . . ." that *per se* treatment is applied. *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 344 (1982). Although the reciprocal assignment of prime contractor responsibilities in the Basic Agreement is pro-competitive, MDC argues that this Court should condemn it as illegal *per se* because shifting prime contractor responsibilities within a team can be simplistically characterized as a market division or allocation of customers.

Such overly simplistic and literal characterizations have been routinely criticized. In *Broadcast Music*, this Court determined that before extending *per se* treatment to an unexamined business practice, the courts must determine whether the:

> "practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, . . . or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.'" 441 U.S. at 19-20 (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978)).

Applying this standard, the Court held that a blanket licensing system of musical compositions, challenged by the plaintiff as unlawful *per se* horizontal price fixing, required rule of reason analysis. This was because without the questioned licensing system, the producers of musical compositions could not have effectively marketed their product to radio broadcasters. In such a case, the *Broadcast Music* Court preferred to rely on "demonstrable economic effect rather than . . . formalistic line drawing" in determining the challenged practice's legality. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 59 (1977).

But for the teaming relationship established by Northrop and MDC, it would have been difficult, if not impossible, for Northrop to have won the NACF competition. MDC alone could not even have entered the competition. Without the teaming relationship, a derivative of Northrop's YF-17 might never have reached the marketplace. The Ninth Circuit was therefore correct in finding that, pursuant to *Broadcast Music*, the teaming relationship warrants rule of reason analysis because it was necessary to bring the team's product to market.[15]

The Ninth Circuit was also correct in holding that the courts lack sufficient experience with both the challenged practice and industry in question to warrant the imposition of the *per se* rule. Teaming arrangements are a unique business practice used in the development and production of complex, high technology, military and aerospace hardware. Neither weapons system teaming agreements, nor the shifting of prime contractor responsibilities between team members in a complex defense procurement, has ever been subject to judicial scrutiny under the antitrust laws. *Per se* treatment, reserved for those particular forms of economic activity that have proven themselves to be "manifestly anticompetitive," *Continental T.V., Inc.*, 433 U.S. at 49-50, and without a "purpose [other than] stifling ... competition," is therefore inappropriate in the instant action. *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963).[16]

The case law cited by MDC is inapposite. *United States* v. *Topco Associates*, 405 U.S. 596 (1972), involved a market division among *actual* horizontal competitors that eliminated actual and potential competition in the sale of private label food products. The territorial restrictions in *Topco* were completely unrelated to the basic purpose of the joint under-

[15] The logical extension of MDC's argument is that *Broadcast Music* was wrongly decided and should be overruled.

[16] Where, as here, the prime-sub relationship is clearly lawful, the shifting of the prime-sub relationship for allocative efficiency reasons is also lawful. Calling the relationship a market or customer division is labelism at its worst. It is not analysis. The assignment of roles within the prime-sub unit does not raise the antitrust concerns postulated by MDC.

taking. There, the purpose was to provide private label food products to small grocery stores so they could compete with the national supermarket chains. As discussed *supra*, MDC was not an actual or potential competitor of Northrop, but was foreclosed from entering the NACF and ACF competitions and *could not have been* a competitor for sales of F-18 aircraft. Moreover, the assignment of prime contractor responsibilities, designed to eliminate conflicting demands by the team's customers, was integrally related to the purpose of forming the team.

MDC also contends that the Ninth Circuit's decision is inconsistent with this Court's decisions in *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980) (per curiam), and *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982). Those cases are easily distinguishable. *Catalano* and *Maricopa* involved blatant price fixing agreements governed by this Court's holding in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). Neither required in-depth analysis of their economic purpose or effect. This Court expressly noted in *Maricopa County* that its decision:

> "should not be confused with the established position that a *new per se* rule is not justified until the judiciary obtains considerable rule of reason experience with the particular type of restraint challenged." 457 U.S. at 349 n.19.

3. The Prime Contractor Responsibility Clause In The Basic Agreement Is An Integral Part Of A License From Northrop To MDC Of Proprietary, Technical Data And Know-How.

The teaming relationship before the Court, like the blanket licensing system in *Broadcast Music*, is a novel business practice being utilized for pro-competitive reasons. The agreements between the parties must therefore be examined for their purpose and effect. Such an analysis will show that the agreements effected a transfer to MDC of valuable, proprietary YF-17, P-530 and P-630 know-how and technical design data

otherwise unavailable to MDC. The accompanying use limitation assigned MDC prime contractor responsibilities for the sale and production of carrier-suitable F-18 aircraft on behalf of the team.

Reasonable use limitations may be employed by a licensor of technology. In *A&E Plastik Pak Co. v. Monsanto Co.*, 396 F.2d 710, 715 (9th Cir. 1968), the court stated:

> "[S]o long as restraints are imposed solely upon their know-how licensees who have not discovered and cannot easily obtain the technology for themselves, the restraints should be valid, if reasonable."

The assignment of prime contractor roles in the Basic Agreement is reasonable. It does not have the purpose or effect of limiting competition. Indeed, in the absence of the parties' agreements, the NACF competition was restricted by congressional mandate to two companies, Northrop and GD. Under the parties' agreements, a third company was given access to the competition and infused with proprietary LWF technology. The role assignments are not "naked restraints" of trade designed to stifle competition and should be upheld as lawful. *See White Motor Co. v. United States*, 372 U.S. 253 (1963).

B. THE GOVERNMENT IS NOT INDISPENSABLE AND MDC IS ACCOUNTABLE FOR ITS UNLAWFUL CONDUCT.

The assertion by MDC that the Government is an indispensable party to this litigation is a thinly veiled attempt to use Fed.R.Civ.P. 19 in conjunction with the Doctrine of Sovereign Immunity to shield itself from liability for otherwise indefensible predatory business conduct. In analogous situations, courts have routinely litigated claims without requiring the presence of the Government. MDC's argument leaves government contractors totally unaccountable for any breach of a duty to a fellow contractor.

The claims made by MDC are unsupported by case law. Courts have routinely adjudicated contract disputes between teaming partners in the military procurement industry, *e.g.*, *Experimental Engineering, Inc. v. United Technologies Corp.*, 614 F.2d 1244 (9th Cir. 1980); *Air Technology Corp. v. General Electric Co.*, 347 Mass. 613, 199 N.E.2d 538 (1964), and disputes between prime contractor and subcontractor, *e.g.*, *American Pipe & Steel Corp. v. Firestone Tire & Rubber Co., 292 F.2d 640 (9th Cir. 1961)*, without requiring the presence of the Government in the action. The courts have specifically rejected suggestions that the Government is an indispensable party to contract and tort claims against federal prime contractors. *Whitaker v. Harvell-Kilgore Corp.*, 418 F.2d 1010 (5th Cir. 1969); *E. I. du Pont de Nemours & Co. v. Lyles & Lang Construction Co.*, 219 F.2d 328 (4th Cir.), *cert. denied*, 349 U.S. 956 (1955).

No court has ever held that a purchaser of a product is an indispensable party to an action brought to adjudicate claims of monopolization, breach of contract, unjust enrichment or unfair competition between suppliers. A person not a party to a commercial contract is not a necessary party to an adjudication of rights under the contract. This is so even though the individual will be affected by the outcome of the litigation. 7 C. Wright & A. Miller, Federal Practice and Procedure § 1613 (1972). *See, e.g., Helzberg's Diamond Shops, Inc. v. Valley West Des Moines Shopping Center, Inc.*, 564 F.2d 816 (8th Cir. 1977); *Trans Pacific Corp. v. South Seas Enterprises, Ltd.*, 291 F.2d 435 (9th Cir. 1961).

The Ninth Circuit's holding that the Government is not a necessary party, much less an indispensable party, to this litigation is well reasoned and supported by the record.[17] The

[17] Although MDC did not argue in the Ninth Circuit that complete relief cannot be granted between Northrop and MDC without the presence of the Government, it now asserts that the Ninth Circuit erred because it found that *meaningful* relief could be fashioned by the District Court. MDC is playing with words. In making its determination, the Ninth Circuit expressly recognized that Fed.R.Civ.P. 19(a)(i) requires that a court be able to provide "*consummate* rather than partial or hollow relief" to the parties. 705 F.2d at 1043 (emphasis added). Thus, the Ninth Circuit did indeed find that complete relief can be granted between the parties.

threshold question under Rule 19 is whether the party to be joined "claims an interest relating to the subject matter of the action. . . ." Fed.R.Civ.P. 19. Subparts (19)(a)(i) and (19)(a)(ii) are contingent upon the requirement that the missing party have a legally protected interest. *Cf., Central Council of Tlingit & Haida Indians of Alaska v. Chugach Native Association,* 502 F.2d 1323 (9th Cir. 1974), *cert. denied,* 421 U.S. 948 (1975). The Ninth Circuit properly found that the Government neither claims nor has any interest in this litigation.

MDC argues that the Ninth Circuit assumed the Government does not claim an interest in the subject matter of the action because of its absence from the lawsuit. That assertion is a complete fabrication. As the Ninth Circuit correctly noted, the Government has not only never asserted a formal interest in the action, but has specifically "declared its intent to respect the teaming relationship, and has consistently advised the parties to resolve their disagreements in accordance with law and their private agreements." 705 F.2d at 1044.

Despite the Government's disavowal of interest, MDC argues that Northrop's requested relief challenges the Government's rights in the data and technology arising from the development of the F-18 weapons system. It argues that the Government is therefore a necessary party to the litigation. Petitioner's argument has no merit. Northrop recognizes that the Government's rights in F-18 data are unlimited. In the District Court, Northrop expressly stated:

> "If the Government . . . goes to McDonnell and says 'we have unlimited rights in this data and taking those unlimited rights and giving them to you, we want you to do this,' the Government is free to do that. They can go to Grumman, they can go to Lockheed. They have unlimited rights. That is not anything we are contesting here." *Id.* at 1045.

The Government's "unlimited rights" in the technology used to design major weapons systems are *not exclusive*. The contractor developing the technology retains the right to transfer such data under license to private contractors. The Ninth Circuit stated:

> "The Government's rights in that [YF-17] data, although unlimited, were neither sole nor exclusive and did not divest Northrop of the residual right to continue to use the technology itself and to share it with other private parties. *See Regents of University of Colorado v. K.D.I. Precision Products, Inc.*, 488 F.2d 261, 264 (10th Cir. 1973) (interpreting language identical to that in 32 C.F.R. § 7-104.9(a)). . . ." 705 F.2d 1044-45.[18]

MDC also argues that if Northrop obtained the relief requested and the Government placed an order for non-carrier-suitable F-18 aircraft with MDC, the Government would be impacted by increased costs resulting from the loss of MDC production efficiencies or through the payment of damages and that MDC would be subject to inconsistent obligations, thus interfering with the Government's military procurement objectives. MDC's assertions are again unsupported. Northrop has only requested relief that would prohibit MDC from committing predatory acts prior to receiving an order for F-18 aircraft from a customer, and a declaration of MDC's obligations under its business agreements with Northrop. If the Government places an order for non-carrier-suitable F-18 aircraft with MDC in the future, MDC would be free to respond, subject to obligations owed to third parties under antecedent agreements.[19]

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[18] MDC, by its contemporaneous conduct, agrees with this principle as it relates to the F-18A. MDC argued below that "*McDonnell owns* all technical data related to the F-18 and the Government has unlimited rights in such data." (emphasis added). In fact, the record shows that MDC has offered to license others F-18A data.

[19] MDC contends that it would be subject to inconsistent obligations if Northrop received the relief requested and the Government directed MDC to eliminate the carrier suitability features of the F-18A pursuant to the "Changes Clause" in its prime contract with the Navy. The existence of a changes clause does not allow a private party to avoid prior contractual obligations with other parties. *See* Westinghouse Electric Corp. v. Garrett Corp., 437 F.Supp. 1301, 1338 (D.Md. 1977), *aff'd*, 601 F.2d 155 (4th Cir. 1979).

The Ninth Circuit found that MDC's arguments are also flawed because they are based on the hypothetical assumptions that the Government will someday order non-carrier-suitable F-18 aircraft from MDC and that MDC will refuse to provide the Government with the requested weapons system configuration. Mere speculation that a third party in the future might take a position inconsistent with relief granted by the court does not render that third party an indispensable party under Rule 19. *Coastal Modular Corp. v. Laminators, Inc.*, 635 F.2d 1102 (4th Cir. 1980); *Arthur v. Starrett City Associates*, 89 F.R.D. 542 (E.D.N.Y. 1981).

MDC's arguments are not only speculative, they are also based on the false premise that the Government has an "enforceable expectation" that a particular contractor will be responsive to its procurement preferences, regardless of the contractor's prior contractual commitments. 705 F.2d at 1045. No customer has an enforceable expectation that a supplier will be willing and able to supply it with a product, or a product at a given price, until a sales contract is consummated. As MDC management consistently testified, the Government has no more right to demand that MDC produce a product for it than a customer in a normal commercial context.[20] MDC is as free to reject an order as the Government is to offer it to another contractor. The Ninth Circuit properly found that the Government's "hypothetical interest" in obtaining non-carrier-suitable F-18 aircraft from the Northrop/MDC team with MDC as prime contractor does not warrant an exception to the general rule that a person not a party to a contract is not a necessary party to an adjudication of rights under the contract. *Id.* at 1046.

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[20] As the Ninth Circuit recognized, there are any number of reasons why a military contractor, like a commercial supplier, might elect not to accept a purchase order directed to it by a customer. For example, a contractor might face plant capacity constraints or labor problems preventing it from accepting a Government order. MDC might have previously committed a significant portion of its capacity to the production of DC-9 and DC-10 airliners for its civil aviation customers. If the Government placed an F-18 order with MDC and MDC unilaterally, and for greater profit, breached its antecedent agreements with its civil aviation customers to fill the Government's order, the Government would surely not be an indispensable party in an action brought by MDC's DC-9 and DC-10 customers for damages.

This Court should not be misled by MDC's claim that because the Government is involved in military weapons procurement, breaches of private agreements in a military sales context differ from those in a strictly commercial context. MDC's reasoning would effectively immunize the nation's military procurement industry from claims resulting from breaches of contract and tortious conduct. As weapons development has become more complex and costly, teaming agreements have been used more and more frequently. This Court should not permit defense contractors to use Rule 19 in conjunction with the Doctrine of Sovereign Immunity as a license to breach duties and obligations owed their teaming partners.

C. THE COURTS ARE NOT PRECLUDED BY THE POLITICAL QUESTION AND ACT OF STATE DOCTRINES FROM ADJUDICATING NORTHROP'S PRIVATE BUSINESS DISPUTE WITH MDC.

1. Prior Applications Of The Political Question Doctrine Demonstrate That This Case Does Not Involve A Non-Justiciable Political Question.

MDC argues that under the Political Question Doctrine delineated in *Baker v. Carr*, 369 U.S. 186 (1962), and applied in *Gilligan v. Morgan*, 413 U.S. 1 (1973), the courts are precluded from adjudicating Northrop's claims against MDC. MDC argues that this action involves military aircraft purchases under the control of the Government and that its predatory conduct is therefore insulated from adjudication by the courts. However, the conduct complained of here did not involve governmental action, decision making or approval. Disputes involving predatory business conduct directed against a competitor are customarily adjudicated by the courts.

The Political Question Doctrine has its origins in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). However, it was not until *Baker v. Carr* that the Court established a six-pronged

test to be used by the judiciary to determine whether an issue before it is a non-justiciable "political question." In *Baker v. Carr*, the Court stated that:

> "Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." 369 U.S. at 217.

Thus, "[j]usticiability is . . . not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures. . . ." *Poe v. Ullman*, 367 U.S. 497, 508-09 (1961). Courts have refused to decide questions such as the legality of a war, *Atlee v. Laird*, 347 F. Supp. 689 (E.D. Pa. 1972), *aff'd sub nom. Atlee v. Richardson*, 411 U.S. 911 (1973), boundary disputes between countries, *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92 (D.C.Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972), and the legitimacy of a newly elected state government in Rhode Island. *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849). The common thread among the cases is that an adjudication of the disputes giving rise to the actions would have forced the courts to become involved in sensitive political issues, thus violating the principles of Separation of Powers and Federalism so important to this nation's political heritage and stability. No such issues are now before this Court.

2. Northrop Seeks No Relief That Would Involve The Judiciary In Military Procurement Decisions.

As discussed earlier, the District Court's invocation of the Political Question Doctrine was premised on its mistaken belief that Northrop seeks a declaration stating from whom the

Government must purchase the F-18 weapons system. Similarly, MDC contends that Northrop is asking the judiciary to become involved in the process of equipping the U.S. military, as was the plaintiff in *Gilligan*, 413 U.S. 1. In *Gilligan*, the plaintiff sought "judicial evaluation of the 'training, weaponry and orders' of the Ohio National Guard" and judicial control in the future over those same facets of the Guard's operations. *Id.* at 5-6. Relief that would involve the judiciary in the evaluation or supervision of military procurement decisions is simply not being sought by Northrop.

In this case, Northrop seeks relief from MDC's private tortious business conduct committed without Government authorization or direction. Northrop has not challenged the propriety or legality of any governmental decision. The Ninth Circuit therefore correctly concluded that "the issues presented for trial are not political questions—they are legal issues, involving private commercial activity which the judiciary is uniquely equipped to resolve." 705 F.2d at 1047.

3. The Claims Asserted By Northrop Would Not Require Inquiry Into The Acts Of A Foreign Government And Are Therefore Not Barred By The Act Of State Doctrine.

As stated in *Williams v. Curtiss-Wright Corp.*, 694 F.2d 300, 302 (3d Cir. 1982), "the act of state doctrine is a policy of judicial abstention from inquiry into the validity of an act by a foreign states. . . ." *See also Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979). The Doctrine is designed to avoid judicial action in areas which would embarrass the Legislative or Executive branches of the Government, or hinder the foreign policy of the United States. *International Association of Machinists and Aerospace Workers v. OPEC*, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982). The Legislative and Executive branches of government have been found to be "better equipped to resolve a politically sensitive question." *Id.* at 1358.

The Act of State doctrine is, however, not jurisdictional and the defendant asserting it as an affirmative defense bears the burden of establishing the necessity for judicial deference. *Alfred Dunhill of London, Inc. v. Republic of Cuba,* 425 U.S. 682 (1976). Absent a strong showing by the defendant, the Doctrine will not be applied to thwart legitimate regulatory goals. *Curtiss-Wright Corp.,* 694 F.2d at 304. The Doctrine requires a factually based examination into the possible effect of judicial inquiry on the foreign relations of the United States, the threat to free competition posed by the alleged conduct and the relative importance of the conduct performed in the United States to the alleged violations. *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.,* 549 F.2d 597 (9th Cir. 1976).[21]

There is nothing in the record to support a dismissal of Northrop's claims pursuant to Fed.R.Civ.P. 12(b). The relief requested by Northrop would not require a court to question the validity of any act of a foreign government or require a court to "sit in judgment on the acts" of a foreign country. *Underhill v. Hernandez,* 168 U.S. 250, 252 (1897).

MDC argues that the Act of State Doctrine bars Northrop's claims because Northrop must show that "its business was damaged as a result of . . . [the] decisions of foreign states not to purchase an F-18L . . . ." Brief for Petitioner at 21. This is not so. Damages suffered by Northrop as a result of MDC's predatory conduct may be established by any number of methods. For example the Ninth Circuit correctly noted that Northrop's claim for damages resulting from duplicating data and technology that MDC wrongfully refused to provide Northrop would not require judicial inquiry into the minds of any foreign government.

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[21] As stated in *Timberlane:* "It is apparent that the doctrine does not bestow a blank-check immunity upon all conduct blessed with some imprimatur of a foreign government." 549 F.2d at 606.

D. THE ROLE OF THE GOVERNMENT IN THE MILITARY PROCUREMENT INDUSTRY DOES NOT NEGATE MDC'S ACCOUNTABILITY FOR EXCLUDING COMPETITION IN VIOLATION OF THE ANTITRUST LAWS.

1. Competition Among Military Contractors Will Result In Lower Costs To The Government For Military Equipment.

In the hope of avoiding a trial on the merits, MDC argues that even if MDC breached its agreements with Northrop and committed the predatory conduct alleged in the First Amended Complaint, the Government exercises such control over the production and marketing of advanced aircraft that "no seller of an advanced air weapons systems can attain monopoly power" that can be used to raise prices.[22] Brief for Petitioner at 24. MDC's argument is sophistry. While the Government is the sole source of domestic demand for military goods, it does not control the number of available suppliers. Competition among suppliers for a sale is just as important an ingredient in holding costs down in the military aircraft industry as it is in a normal commercial context.

The District Court in granting MDC's motion for summary judgment assumed as a factual matter that the Government exercises such "absolute and over-riding control" that no monopoly was threatened. 498 F. Supp. at 1123. The Ninth Circuit in reviewing the District Court's decision correctly noted:

> "The record does not indicate as a matter of law that the military aircraft industry enjoys some sort of natural monopoly that renders inapplicable the premise of the antitrust laws that competition will assure the consumer the best product at the lowest price." 705 F.2d at 1055.

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[22] MDC's "monopsonist" argument is at best incomplete, inaccurate and misleading. The Government is well aware of the importance of preserving competition in the weapons industry. *See, e.g.*, Defense Acquisition Regulation 4-117, 32 C.F.R. § 4-117 (1982); Grumman Corp. v. LTV Corp., 665 F.2d 10 (2d. Cir. 1981).

The Ninth Circuit is correct.[23] The Government in implementing its procurement policies has consistently recognized the many advantages of competition between suppliers for Government contracts. This Court need look no further for an example of the Government's interest in competition among suppliers than the LWF, ACF and NACF competitions.

As for foreign sales of major weapons systems, the Government simply plays the role of export traffic manager. As with all commercial products, it makes a determination as to what products can be exported to what countries consistent with U.S. foreign policy. The Government then allows the foreign government to choose freely the product it will purchase from those items approved for export. Private American military contractors thereafter compete among themselves and with their foreign counterparts by delivering a better product at a lower price. The foreign governments benefit from such competition accordingly.

2. Military Contractors Engaging In Predatory Business Conduct Are Not Immune From Claims Under The Sherman Act.

MDC contends that because the Government is the only domestic purchaser of military aircraft, a seller of such aircraft cannot obtain monopoly power. The necessary implication

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[23] If MDC were correct, no conduct engaged in by a government contractor would ever raise antitrust concern. By such analysis, an entire body of case law, ignored by MDC, would be a series of idle acts and erroneous advisory opinions. Courts have considered a number of cases arising in the defense industry where the Government was the sole purchaser. The antitrust laws were held applicable. Williams v. Curtiss-Wright Corp., 694 F.2d 300 (3rd Cir. 1982) (military aircraft engines). Grumman Corp. v. LTV Corp., 665 F.2d 10 (2d Cir. 1981) (carrier-suitable aircraft); Pacific Engineering & Production Co. v. Kerr-McGee Corp., 551 F.2d 790 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977) (ammonium perchlorate for missiles); Pacific Seafarers, Inc. v. Pacific Far East Line, Inc., 404 F.2d 804 (D.C.Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969) (U.S.-financed shipping); Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561 (10th Cir. 1961) (government sole purchaser of uranium ore), *cert. dismissed sub nom.* Wade v. Union Carbide & Carbon Corp., 371 U.S. 801 (1962); American Standard, Inc. v. Bendix Corp., 487 F.Supp. 265 (W.D.Mo. 1980) (specialized communications gear for military aircraft); Ovitron Corp. v. General Motors Corp., 295 F.Supp. 373 (S.D.N.Y. 1969) (Army field radios).

arising from this contention is that military contractors are forever immune from Section 2 Sherman Act claims arising out of their predatory business conduct. Antitrust immunities are, however, strongly disfavored and will be recognized only when expressly granted by statute or where plain repugnancy exists between the Sherman Act and federal regulation. *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963). Extensive regulation of an industry does not alone confer blanket immunity on predatory business conduct in the regulated industry. *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).

Applying the standard set forth in *Philadelphia National Bank* and *Otter Tail*, predatory conduct in the military aircraft industry does not enjoy either express or implied immunity. Congress intended the antitrust laws to apply to private conduct in the industry. The Armed Services Procurement Act of 1947, 10 U.S.C. 2305(d) (1976), provides that whenever a military procurement agency believes that a "violation of the antitrust laws" has been committed in connection with a military procurement contract, the procuring agency must notify the Attorney General of the United States of the violation. Additionally, International Traffic in Arms Regulation 124.11(d), 22 C.F.R. § 124.11(d) (1983), promulgated under the International Security Assistance and Arms Export Control Act of 1976, 22 U.S.C. 2751 *et seq.*, provides that licensing approval by the Office of Munitions Control of agreements for foreign manufacturing and technical assistance is not to be interpreted as "passing on the legality of the agreement from the standpoint of antitrust laws. . . ." The laws governing the sale of military hardware do not immunize military contractors competing for foreign or domestic sales from antitrust liability. Rather, they affirm the Government's interest in the efficiency goals associated with the Sherman Act and the preservation of free competition.[24]

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[24] When not posturing before this Court, MDC readily admits its monopoly power in the F-18 market, and its motive for excluding Northrop. A MDC Corporate Vice-President testified that MDC strove to keep tooling away from Northrop so that it could maintain its position as a "sole source," which "means that your subsequent contract awards are negotiated and not competitively arrived at . . . It's a desirable situation . . . *You don't have to recompete for it again and again and again* . . ." (emphasis added).

3. The Ninth Circuit Found That There Was Sufficient Evidence Of Dangerous Probability Of Monopolization To Preclude Summary Judgment.

In an effort to create a controversy where none exists, MDC asks this Court to decide whether dangerous probability of monopolization must be proven in all monopolization cases or whether it can be inferred from specific intent or dispensed with altogether. Had the Ninth Circuit relied on its decision in *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964), that issue might be before this Court. The Ninth Circuit in this case, however, expressly found that "there was sufficient evidence of McDonnell's probability of success [of monopolization] to avoid summary judgment." 705 F.2d at 1058. The court did not infer dangerous probability of monopolization from the mountain of intent evidence before it, or dispense with the requirement. Rather, the court decided for the reasons discussed above that monopoly power and its associated evils can be achieved in the military aircraft industry through predatory business conduct.

IV

CONCLUSION

The respondent respectfully asks this Court to deny MDC's Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit for the reasons set forth in this Brief.

Respectfully submitted,

DON T. HIBNER, JR.
333 South Hope Street, Suite 4800
Los Angeles, California 90071

JOHN W. CHIERICHELLA
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036
Counsel for Respondent
Northrop Corporation

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Of Counsel:

SHEPPARD, MULLIN, RICHTER & HAMPTON
333 South Hope Street, Suite 4800
Los Angeles, California 90071
(213) 620-1780

CROWELL & MORING
1100 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 452-5800

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